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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN RICHARD WISE, Defendant and Appellant.	H036876 (Monterey County Super. Ct. Nos. SS100912, SS101039, SS101076)

In the court below, defendant Benjamin Richard Wise unsuccessfully moved to suppress evidence. He thereafter pleaded guilty to two counts of possession of methamphetamine for sale and one count of possession of cocaine base for sale. On appeal, he challenges the trial court's ruling on his suppression motion. He principally contends that the trial court erred in finding that he had no expectation of privacy in one of the homes searched and the police officers' entry into that home was lawful. We disagree and affirm the judgment.

BACKGROUND

On March 5, 2010, Monterey Police Officer Michael Bruno participated in a surveillance of 199 Laine Street to determine whether Thomas Nichols lived there and, if so, conduct a probation search. He had last contacted Nichols nine months previously at that address, which belonged to Nichols' brother, Joseph. He saw a white van that Nichols drove parked in the home's driveway. He saw Nichols freely exiting and entering the home several times. He and Detective Aaron Delgado walked to the front

door and knocked. Nichols answered, and Officer Bruno asked Nichols to step outside. Nichols complied, and Detective Delgado asked him whether anyone else was inside the home. Nichols affirmed that others were inside. Reynaldo Martinez and Joseph Nichols then stepped outside. The officers asked whether anyone else was inside, and Joseph Nichols stated that no one else was inside. Detective Delgado entered the home after announcing himself and his intention to conduct a probation search. He heard someone yell inside one of the rooms. Defendant walked out of one of the bedrooms with his hand inside his jacket pocket. Detective Delgado repeated that he was a police officer and ordered defendant to take his hand from his pocket. Defendant began to comply then thrust his hand back into his pocket and exclaimed, "Fuck you. You're not a cop." At that point, Detective Delgado lunged forward, trapped defendant's hand inside the pocket, and pinned defendant against the wall. He removed defendant from the premises and arrested him for resisting a police officer. He conducted a search of the premises and uncovered drug paraphernalia of which Joseph Nichols claimed ownership. In the bedroom where defendant had been, he found defendant's open backpack containing digital scales and baggies. The officers transported defendant to the police station, searched him, and found $1,200 and a baggie containing methamphetamine.

Officer Delgado recounted the facts of the probation search and defendant's arrest plus an informant's tip about purchasing methamphetamine from defendant in a search warrant affidavit seeking a warrant to search defendant's Glenwood Circle apartment and Laine Street. The search of Glenwood Circle yielded cocaine base, marijuana, two revolvers, baggies, $280, and drug paraphernalia. The search of Laine Street yielded methamphetamine, cocaine, marijuana, and drug paraphernalia.

On April 2, 2010, a police officer stopped defendant for a traffic violation and arrested defendant for being under the influence of a controlled substance. He searched the car and found methamphetamine. Officer Bruno recounted the facts of the probation search, defendant's arrest at Laine Street, the fruits of the previous search warrant, and

defendant's arrest after the traffic stop in a search warrant affidavit to again search Glenwood Circle. The search uncovered methamphetamine, $700, and drug paraphernalia.

Defendant's theory underlying several suppression motions was that the probation and warrant searches of Laine Street were unlawful. He urged that he could challenge the seizure of various items of contraband from Laine Street that incriminated him because he was an overnight guest and, thus, had a reasonable expectation of privacy in the premises. He also advanced that the officers' warrantless entry into Laine Street was unlawful and, thus, his arrest was unlawful, which tainted the search incident to arrest and the affidavits justifying the warrant searches of Glenwood Circle and Laine Street.

At the suppression hearing, Joseph Nichols testified that he had lived at Laine Street for nine years. He added that defendant was one of his best friends and had visited Laine Street many times and stayed overnight many times. He stated that March 5, 2010, was Reynaldo Martinez's birthday and he had invited defendant to a birthday party for Martinez at Laine Street. He believed that drinking might occur and invited defendant to sleep overnight at Laine Street. He added that he had resisted the probation search by telling the officers that Thomas Nichols did not live at Laine Street.

The trial court explained as follows: "There has been an insufficient showing of a reasonable expectation of privacy. [¶] The Court has before it a witness who testified there was an invitation extended to the defendant to spend the night. That by itself does not, in this Court's opinion, suffice to demonstrate an expectation of privacy in a home. [¶] There is no evidence before the Court that that invitation was accepted. There is no evidence before the Court that the defendant had any personal belongings in the home. So the expectation of privacy has not been shown." At a later hearing, the trial court elaborated as follows: "Part of the way I viewed this, assuming for the sake of argument there was a conversation in which Mr. Nichols invited [defendant] to spend the night after a party, there is no--when I talked about 'no belongings,' he had a backpack, it did

not contain any--what would, I guess, commonly be referred to as overnight items, such as a toothbrush, change of clothing, pajamas, anything that indicated that he was anticipating spending the night. . . . And even--assuming, for the sake of argument, the Court believed there was an acceptance of the invitation as establishing a reasonable expectation of privacy in a home, in that, I think--the facts presented was that there was going to be a party. There might have been drinking. If there was going to be drinking, and if the Defendant had been drinking, I think the inference was he was more than welcome to stay. But it's just as likely that the Defendant would have gone to the party, stayed, not stayed, met someone, maybe gone to someone else's house. I don't think that an invitation to spend the night, by itself, whether accepted or not, is going to be sufficient to establish an expectation of privacy."

DISCUSSION

Defendant first argues that the trial court erred in rejecting the uncontested testimony that he was an invited overnight guest with an expectation of privacy in Laine Street. Defendant's analysis is erroneous.

"No less than a tenant of a house, or the occupant of a room in a boarding house, [citation] a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." (*Stoner v. California* (1964) 376 U.S. 483, 490.) In addition, a host's overnight guest has a reasonable expectation of privacy in his host's home. (*Minnesota v. Olson* (1990) 495 U.S. 91, 98-99 (*Olson*).)

The defendant in *Olson* "had been staying" at the residence searched. (*Olson, supra*, 495 U.S. at p. 94.) Speaking in regard to an overnight guest, the United States Supreme Court stated: "We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home." (*Id.* at p. 98.)

In short, "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." (*Minnesota v. Carter* (1998) 525 U.S. 83, 86, 90 (*Carter*).)

In *Carter*, the court determined that individuals present at another's apartment for the sole purpose of packaging cocaine have no legitimate expectation of privacy in the premises. There, the "[r]espondents and the lessee of an apartment were sitting in one of its rooms, bagging cocaine." (*Carter, supra*, 525 U.S. at p. 85.) "[The respondents] had never been to the apartment before and were only in the apartment for approximately 2 1/2 hours. In return for the use of the apartment, [the respondents] had given [the lessee] one-eighth of an ounce of the cocaine." (*Id.* at p. 86.) There was no suggestion that the respondents had a previous relationship with the lessee or that there was another purpose to their visit aside from packaging the cocaine. (*Id.* at p. 90.) "Respondents here were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours." (*Ibid.*)

In slightly different circumstances, we have also examined whether a defendant had the same expectation of privacy as an overnight guest though the defendant was not an overnight guest. In *People v. Cowan* (1994) 31 Cal.App.4th 795, the defendant apparently visited an apartment only as a companion of an occupant who was not the owner of the apartment. He had the owner's permission to be present under those circumstances. We concluded that, "[a]t most, defendant established his legitimate presence on the searched premises by invitation. Defendant did not have control over the premises in any sense and accordingly, he did not have a legitimate expectation of privacy under . . . *Olson*." (*Id.* at p. 801.) He was comparable to a " ' "casual, transient visitor" ' on the night in question." (*Id.* at p. 800.)

Viewed from its proper perspective, this case is more akin to *Carter* and *Cowan* than *Olson*.

"Defendant bears the burden of showing a legitimate expectation of privacy. [Citation.] Among the factors to be considered are ' " 'whether the defendant has a [property or] possessory interest in the thing seized or the place searched; whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that it would remain free from governmental invasion, whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises.' " ' " (*People v. Roybal* (1998) 19 Cal.4th 481, 507.)

"We generally apply the familiar substantial evidence test when the sufficiency of the evidence is at issue on appeal. Under this test, ' "we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment . . . . 'In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing.*' [Citation.] All conflicts, therefore, must be resolved in favor of the respondent." ' [Citation.]

"But this test is typically implicated when a defendant contends that the plaintiff succeeded at trial in spite of insufficient evidence. In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. This follows because such a characterization is conceptually one that allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact's unassailable conclusion that the party with the burden did not prove one or more elements of the case (*Oldenburg v. Sears, Roebuck & Co.* (1957) 152 Cal.App.2d 733, 742 [trier of fact is the exclusive judge of the credibility of the evidence and can reject evidence as unworthy of credence]; *Hicks v. Reis* (1943) 21 Cal.2d 654, 659-660 [trial court is entitled to reject in toto the testimony of a witness, even if that testimony is uncontradicted]).

"Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' " (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1528.)

Here, the case posed evidentiary conflicts. Joseph Nichols testified that defendant was to be an overnight visitor. However, defendant did not bring with him overnight belongings or a change of clothes. The setting was a party atmosphere, which supports the trial court's inference that any overnight arrangement was optional rather than set in stone. Moreover, there was no evidence that defendant had control over any part of Laine Street. In short, the trial court simply made subjective evaluations about conflicting evidence and essentially found that (1) Joseph Nichols' testimony was not credible, and (2) defendant had accordingly failed to carry his burden of proof. "It is not our function to retry the case. . . . This is simply not a case where undisputed facts lead to only one conclusion." (*In re I.W.*, *supra*, 180 Cal.App.4th at pp. 1528-1529.)

Defendant next argues that the probation search of Laine Street was unlawful because the officers had no reasonable belief that Nichols resided there. From there, he urges that any evidence implicating him found during the probation search and the search of his person incident to arrest was the fruit of the officers' unlawful probation search. And he continues that the two warrant searches were also the fruit of the unlawful probation search. As to this, he asserts that the basic premise of the affidavits supporting the two search warrants was that he was a drug dealer. He reasons that the warrants are invalid as lacking probable cause if the facts about the unlawful probation and arrest searches (implying that he was a drug dealer) are excised from the affidavits supporting

issuance of the warrants. We disagree that the probation search was unlawful. Defendant's secondary claims therefore fail of necessity.

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. (*People v. Rios* (2011) 193 Cal.App.4th 584, 590.) "Because the officers here lacked a warrant, the People bore the burden of establishing, by a preponderance of the evidence, an exception to the warrant requirement." (*Ibid.*)

" 'In California, a person may validly consent in advance to warrantless searches and seizures in exchange for the opportunity to avoid serving a state prison term. [Citations.] Warrantless searches are justified in the probation context because they aid in deterring further offenses by the probationer and in monitoring compliance with the terms of probation. [Citations.]' [Citation.] However, 'a search of a particular residence cannot be "reasonably related" to a probationary purpose when the officers involved do not even know of a probationer who is sufficiently connected to the residence.' [Citation.] Accordingly, [there is] a 'knowledge-first requirement . . . .' " (*People v. Downey* (2011) 198 Cal.App.4th 652, 657.)

" 'It is settled that where probation officers or law enforcement officials are justified in conducting a warrantless search of a probationer's residence, they may search a residence reasonably believed to be the probationer's. . . . [T]he question of whether police officers reasonably believe an address to be a probationer's residence is one of fact, and we are bound by the finding of the trial court, be it express or implied, if substantial evidence supports it.' " (*People v. Downey*, *supra*, 198 Cal.App.4th at p. 658.)

The trial court did not make an express finding that the officers had a reasonable belief that Nichols resided at Laine Street. However, the suppression hearing testimony and search warrant affidavits are to the following effect. Officer Bruno looked up Nichols in the police data base and learned that Nichols' last known address was Laine

Street where Officer Bruno had made contact with Nichols nine months previously. Detective Delgado saw Nichols outside Laine Street on more than one occasion during February 2010. He saw the white van outside Laine Street in February 2010. He knew that Nichols was on probation with a search condition as a result of Nichols' possession of methamphetamine while driving the white van from Laine Street. He saw Nichols inside the white van when he arrived at his surveillance of Laine Street. He saw Nichols enter and exit Laine Street no less than 10 times without knocking. He saw Nichols meet three people at the residence.

Defendant claims that the officers did not thoroughly investigate where Nichols lived. According to defendant: "This investigation was insufficient to justify any reasonable determination that Thomas Nichols lived at 199 Laine Street. Indeed, it seemed designed to determine whether Thomas might be associated with Laine Street, not designed to determine where Thomas actually lived. Since Thomas' brother Joseph had lived at the Laine Street address for nine years, a fact presumably easy to determine with a little investigation, Thomas' occasional presence at Laine Street by itself is no proof of residency."

But the issue is not Nichols' proof of residency. It is whether the officers reasonably believed that Nichols resided at Laine Street. And the evidence supports the trial court's implicit conclusion that the officers did so reasonably believe. Nichols' last known address was Laine Street. Nine months after Officer Bruno contacted Nichols residing at Laine Street, Nichols and the van he drove were still located at Laine Street--in February 2010 and on March 5, 2010. Nichols went in and out of Laine Street and met others at Laine Street as if he had some type of dominion. This is substantial evidence to support the trial court's implicit conclusion that the officers reasonably believed that Nichols resided at Laine Street. There is no requirement that the officers must investigate the question to eliminate all doubt.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.